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In the Supreme Court of the United States

OCTOBER TERM, 1994

EARTH ISLAND INSTITUTE, MARINE MAMMAL FUND, ET AL., PETITIONERS

v.

RONALD H. BROWN, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether this action in the district court to enforce 16 U.S.C. 1371(a)(2), which bans the importation of fish caught with commercial technology that causes excessive harm to ocean mammals, was properly dismissed because it falls within 28 U.S.C. 1581(i)(3), which grants the Court of International Trade exclusive jurisdiction over actions that "arise[] out of any law of the United States providing for * * * embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety."

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. B1-B8) is reported at 28 F.3d 76. The opinion of the district court (Pet. App. A1-A18) is reported at 785 F. Supp. 826.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1994. A petition for rehearing was denied on July 5, 1994. Pet. App. C1-C2. The petition for a writ of certiorari was filed on September 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1988, petitioners filed this action against certain federal officials in the United States District Court for the Northern District of California.[1] Petitioners alleged that the government was failing to enforce provisions of the Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. 1361 *et seq.*, limiting the incidental killing and injury of marine mammals by tuna fishing fleets in the eastern tropical Pacific Ocean that use "purse seine" nets. See 16 U.S.C. 1371(a)(2)(A)-(C) (1988 & Supp. V 1993). In August 1991, petitioners moved for summary judgment and sought preliminary and permanent injunctive relief "regarding [the] intermediary nation embargo" (C.A. App. 38) set forth in 16 U.S.C. 1371(a)(2)(C) (Supp. V 1993):

> The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For purposes of applying the preceding sentence, the Secretary —
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> * * * * *
>
> (C) shall require the government of any intermediary nation to certify and provide reasonable proof to the Secretary that it has not imported, within the preceding six months, any yellowfin tuna or yellowfin tuna products that are

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[1] Respondents are the Secretary of Commerce, the Secretary of the Treasury, the Administrator of the National Oceanic and Atmospheric Association, and the Assistant Administrator of the National Marine Fisheries Service. See Pet. App. B3.

subject to a direct ban on importation under subparagraph (B).[2]

The district court granted a preliminary injunction that prohibits the government "from permitting the importation into the United States of all yellowfin tuna and tuna products from any intermediary nation" pending certification of that nation's compliance, and requires the government "to implement forthwith a program to enforce the secondary embargo" prescribed in Section 1371(a)(2)(C). Pet. App. A16-A17.[3] The district court refused, however, to grant petitioners summary judgment or a permanent injunction. *Id.* at A15-A16.

2. The United States Court of Appeals for the Ninth Circuit vacated the preliminary injunction, holding that "the district court lacked jurisdiction" to issue it. Pet. App. B3. The court of appeals determined that exclusive

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[2] As the district court's opinion and petitioners' pleadings reflect, the ban imposed by Section 1371(a)(2)(C) is called a "secondary embargo" (Pet. App. A1), because it aids the "primary embargo" (*id.* at A2) imposed by Section 1371(a)(2)(B) on nations whose yellowfin tuna harvesting takes too many dolphins. Section 1371(a)(2)(C) prevents "tuna laundering"—*i.e.*, the importation of tuna subject to the primary embargo after prior sale in an "intermediary nation." See Pet. App. A2-A3. Section 1371(a)(2)(C) was amended in 1992 in respects not relevant to the question presented here. For the sake of consistency with the court of appeals' opinion (see Pet. App. B4 n.1), we refer to the amended version of the provision in this brief.

[3] The district court and the court of appeals denied respondents' application for a stay of the district court's order granting a preliminary injunction. Although the court of appeals later issued a decision vacating that injunction, it stayed its mandate pending disposition of the instant petition. Consequently, the preliminary injunction remains in effect. Twenty intermediary nations were subject to the embargo when the injunction was entered; three nations are now subject to the embargo.

jurisdiction over this action lies in the Court of International Trade (CIT) under 28 U.S.C. 1581(i)(3), which provides in pertinent part:

> [T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for —
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> * * * * *
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety.

The court of appeals observed that the question "whether [petitioners'] MMPA suit * * * is an action which arises out of a law 'providing for embargoes'" (Pet. App. B5) is governed by *K Mart Corp.* v. *Cartier, Inc.*, 485 U.S. 176 (1988), which "addressed the meaning of 'embargo' as that term is used in 28 U.S.C. § 1581" (Pet. App. B5). The court of appeals determined that the statutory ban on the importation of tuna, upon which petitioners' suit was based, is analogous in all relevant respects to the regulatory ban on the importation of fur-seal and sea-otter skins that this Court cited in *K Mart* as an example of a law providing for an "embargo" within the meaning of 28 U.S.C. 1581. Pet. App. B7, citing 485 U.S. at 184. The court rejected petitioners' argument that Section 1581 limits the jurisdiction of the CIT to "trade matters and other traditional areas." Pet. App. B7-B8. The court concluded that such a "functional approach" to interpreting Section 1581 would be at odds with this Court's recognition in *K Mart* that "[Section] 1581 extends [the CIT's] jurisdiction to all kinds of

embargoes, not just those rooted in trade policy or import transactions." Pet. App. B8, citing *K Mart*, 485 U.S. at 184.

ARGUMENT

The court of appeals correctly relied on this Court's decision in *K Mart Corp.* v. *Cartier, Inc.*, 485 U.S. 176 (1988), to hold that this action falls within the exclusive jurisdiction of the Court of International Trade (CIT) under 28 U.S.C. 1581(i)(3). Further review therefore is not warranted.

1. Petitioners err in contending that the decision below conflicts with *K Mart*. Pet. 12-19. To the contrary, *K Mart* strongly supports the court of appeals' holding that 16 U.S.C. 1371(a)(2)(C) (Supp. V 1993), the provision of the Marine Mammal Protection Act (MMPA) upon which this action is based, is a law "providing for embargoes" within the meaning of 28 U.S.C. 1581(i)(3), and that this action therefore falls within the exclusive jurisdiction of the CIT.[4]

Section 1371(a)(2)(C) plainly imposes an "embargo" as that term was construed in *K Mart*. The Court there held that Congress intended the term "embargo" to have its "ordinary meaning" in 28 U.S.C. 1581(i)(3): *i.e.*, "a

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[4] Moreover, the Ninth Circuit's decision in this case is consistent, as the panel below recognized (Pet. App. B7), with the Ninth Circuit's prior decision in a case brought by petitioner Earth Island Institute, in which the Ninth Circuit held that a "nearly identical statute" (*ibid.*) was a law "providing for embargoes" within the meaning of 28 U.S.C. 1581(i)(3). *Earth Island Inst.* v. *Christopher*, 6 F.3d 648, 651-652 (1993). Rather than seek certiorari in that prior case, petitioner Earth Island filed a new action, asserting the same claims, in the CIT. See *Earth Island Inst., et al.* v. *Warren Christopher, Secretary of State, et al.*, CIT No. 94-06-00321 (compl. filed June 6, 1994).

governmentally imposed quantitative restriction—of zero—on the importation of merchandise." *K Mart*, 485 U.S. at 184, 185. Section 1371(a)(2)(C) imposes such a governmental restriction; "zero" is the quantity of "merchandise" (yellowfin tuna and tuna products) that may be imported from intermediary nations under the statute, in the absence of the required certification. Thus, as the court of appeals observed, Section 1371(a)(2)(C) closely resembles the regulatory ban on the importation of fur-seal and sea-otter skins that this Court cited in *K Mart* as an example of a law providing for an "embargo" within the meaning of 28 U.S.C. 1581. Pet. App. B7, citing 485 U.S. at 184.[5]

Petitioners argue that Section 1371(a)(2)(C) "does not erect a trade embargo" because it "is not directed to international trade." Pet. 13. The CIT's exclusive jurisdiction under 28 U.S.C. 1581(i)(3), however, is not limited to cases involving *trade* embargoes; it extends, with specified exceptions, to cases arising under "any law * * * providing for * * * embargoes." Moreover, there is "no evidence that Congress intended to constrain the ordinary meaning of the word 'embargoes' to mean embargoes that are grounded in trade policy.'" *K Mart*, 485 U.S. at 184.[6]

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[5] Petitioners argue that Section 1371(a)(2)(C) does not impose an "embargo" because it does not restrict imports from a nation that provides the certification specified in the statute. Pet. 14. The court of appeals correctly rejected that argument, noting that the regulatory ban on the importation of fur-seal and sea-otter skins cited in *K Mart* as an example of an embargo similarly did not prohibit the entry of items that were "'officially marked and certified' as required by statute." Pet. App. B7, quoting 19 C.F.R. 12.60, 12.61.

[6] Petitioners err in suggesting that the decision below is "inconsistent" (Pet. 17 n.15) with *Japan Whaling Ass'n* v. *Ameri-*

2. Under 28 U.S.C. 1581(i)(3), the CIT does not have exclusive jurisdiction over an action based on a law providing for an embargo "for * * * the protection of the public health or safety." Petitioners argue that, even if the MMPA provision upon which they rely, Section 1371(a)(2)(C), imposes an "embargo," it is an embargo "for * * * the protection of the public health

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can Cetacean Society, 478 U.S. 221 (1986). The issue there was whether the Secretary of Commerce was required under the Pelly and Packwood Amendments to certify that Japan's whaling practices diminished the effectiveness of the International Convention for the Regulation of Whaling because that country's annual whale harvests exceeded quotas established under the Convention. *Id.* at 223. A certification by the Secretary would have required the Secretary to reduce Japan's fishery allocation in United States waters by at least 50%. See 16 U.S.C. 1821(e)(2)(B). Such a sanction, however, is not an embargo, because it does not restrict the importation of goods; instead, it restricts the activity of foreign fishing vessels with respect to fisheries subject to the exclusive management authority of the United States. See 16 U.S.C. 1821(e)(1). The Secretary's certification also empowered the President in his discretion to impose additional import restrictions, some of which may have constituted embargoes. See 22 U.S.C. 1978(a)(4). It is doubtful that the attenuated link between the Secretary's certification and the possibility of discretionary sanctions by the President constituting an embargo would have made the case one within the exclusive jurisdiction of the CIT under 28 U.S.C. 1581(i)(3). In any event, neither the parties nor this Court in *Japan Whaling* addressed that jurisdictional question; thus, the decision is inapposite. See, *e.g.*, *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 63 n.4 (1989) ("this Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case finally brings the jurisdictional issue before us"), quoting *Hagans* v. *Lavine*, 415 U.S. 528, 535 n.5 (1974). Moreover, even an express holding that the exclusivity provision of Section 1581(i)(3) does not extend to the attenuated circumstance presented in *Japan Whaling* would be entirely consistent with the decision of the court of appeals in this case.

or safety," and that this case therefore falls outside the CIT's jurisdiction under Section 1581(i)(3). Pet. 24-26.

Petitioners did not raise that argument in the court of appeals, however, and that court accordingly did not address it.[7] This Court ordinarily does not review arguments that were neither raised nor addressed in the courts below. See, *e.g.*, *Zobrest* v. *Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Petitioners offer no reason for this Court to depart from that practice in this case. To the contrary, petitioners offer a compelling reason against such a departure when they acknowledge (Pet. 17 n.15) that no other lower court has addressed the issue whether Section 1371(a)(2)(C) imposes an embargo "for * * * the protection of the public health or safety" within the meaning of 28 U.S.C. 1581(i)(3).

In any event, petitioners' argument is without merit. Petitioners reason that "[a]lthough the MMPA is directly concerned with the health and safety of marine mammals and the marine ecosystem, protection of the ecosystem very obviously promotes human health and safety." Pet. 24. The same reasoning, however, could be applied to the regulatory ban on the importation of fur-seal and sea-otter skins that this Court in *K Mart* indicated would constitute an embargo within Section 1581(i)(3). See 485 U.S. at 184. More fundamentally, petitioners' reasoning proves too much. Most embargoes, including embargoes implementing trade policy, could be said to promote human safety and health in some sense. Petitioners' reasoning thus would exclude from the

[7] The jurisdictional issue was not raised by any of the parties in the district court until the government sought a stay of the preliminary injunction (see Pet. 10).

CIT's exclusive jurisdiction under Section 1581(i)(3) even cases involving classic trade embargoes.

3. Petitioners contend that the decision below "will * * * oust federal district and appellate courts from their traditional role in the enforcement of a variety of * * * environmental statutes." Pet. 16. Petitioners' twin concerns are that the CIT (in their view) lacks the expertise to enforce environmental statutes and that cases which do not really involve "embargoes" will end up in the CIT. See Pet. 18-19. Those concerns, however, do not warrant further review in this case.

As the court of appeals correctly recognized, the statute granting jurisdiction to the CIT over cases involving embargoes must be applied as written. Pet. App. B8. The court of appeals therefore properly rejected the "functional approach" urged by petitioners, which would require a case-by-case determination of whether an action falls within the CIT's expertise. *Ibid.* That some embargoes may be imposed "to protect * * * ecology" (*K Mart*, 485 U.S. at 184), rather than to implement trade policy, is no reason to ignore the terms of the statute including the former type of embargoes within the CIT's exclusive jurisdiction.

Furthermore, although it may sometimes be difficult to decide whether a particular statute "provid[es] for embargoes" within the meaning of Section 1581(i)(3), this is not such a case. An "embargo" is precisely what petitioners sought (C.A. App. 38) and what the district court erroneously granted (Pet. App. A17). Further review therefore is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied

Respectfully submitted.

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